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UNITED STATES CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT.

SARAH POOL,

Appellant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue of Montana,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Montana.

Appearances:

CHAS. A. RUSSELL,
CHAS. N. MADEEN,
H. H. CLARKE,
JOHN E. PATTERSON,
DAN J. HEYFRON,

Attorneys for Appellant.

Filed: .....

.....Clerk.

NO.....

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Attorneys for Appellant.

STATEMENT OF THE CASE.

This appeal arises upon a decree of the United States District Court for the District of Montana, dismissing the bill of appellant praying that injunction issue against the appellee to prevent the execution and sale of appellant's property under a certain distraint warrant issued by him, against property owned by the appellant.

The bill (r. 1) set forth that appellant was the wife of one Frank E. Pool, of Missoula, Montana; that the appellee, as Collector of Internal Revenue, for said District, had attached by distraint certain certificates of deposit owned by this appellant and threatened to sell the same to satisfy a purported claim against the husband of this appellant. It was further alleged that the warrant for distraint was issued upon the ground that appellant's husband was chargeable with and indebted to the United States for taxes and penalties purported to be assessed against him by the appellee for alleged violation of the Internal Revenue Laws of the United States for the illicit manufacture of intoxicating liquor.

Appellant in said bill denied that she was liable for any taxes and penalties in violation of said law, and that the said warrant of distraint and penalties thereunder were based, not upon any taxes, but upon a penalty or fine purported to be imposed against appellant's husband for violation of law.

It was further alleged that no civil or criminal suit or action had been commenced by said appellee to

determine appellant's liability to any tax or penalty; that she had no personal property or any funds with which to pay said claim; that she was unable to pay same, and if the property is sold would be deprived thereof without due process of law.

Upon filing this bill an order to show cause and attempted restraining order issued (r. 7) and thereafter the appellee, as Collector of Internal Revenue filed his motion to dismiss the bill of complaint upon the ground that it appeared on the face thereof that the suit was brought for purpose expressly forbidden by law and that the court had no jurisdiction. At the same time the appellee filed his answer in which he alleged that there had been duly imposed by the commissioner of internal revenue a tax upon the said Sarah Pool, plaintiff above mentioned, under the revenue laws of the United States; that a warrant for distraint was issued for collection of said taxes, pursuant to law, by the said appellee and duly levied upon the property mentioned and described in the bill; that appellee had advertised the said certificates of deposit for sale and published the notice thereof as required by law; that the appellant had not paid the said tax, nor any part thereof, and the same was wholly uncollected at the time answer was filed. (r. 9.)

Thereafter (r. 12) the cause came on for hearing and the court ordered that the injunction be denied and the suit dismissed.

In the decision handed down by the court (r. 14) it is recited that the plaintiff seeks to enjoin the defendant

from collecting taxes and penalties assessed and levied against her by the commissioner of Internal Revenue based upon her alleged distillation of intoxicating liquors. The bill is dismissed by the lower court on the ground and for the reason that Section 3224 prohibits any suit for purpose of restraining assessment for collection of any tax and this statute operates as a bar to that suit here.

The decree (r. 16) grants the motion of defendant to dismiss the bill and orders, adjudges and decrees that the bill of complaint be dismissed.

Briefly, the salient facts are that the distress proceedings by the Collector of Internal Revenue sought to be enjoined in this suit, purport to be instituted for the recovery of a tax and a penalty for the illicit manufacture of intoxicating liquor under the provisions of Section 35 of Title II of the National Prohibition Act. The taxes have been levied by said Collector assessed against appellant. The illicit manufacture upon which it is based was carried on by the husband of this appellant at their joint home, and this appellant did not participate therein in any manner.

While not incorporated in the record it is a fact, as the writer of this brief feels bound to bring every irregularity to the court's attention, that the federal revenue officers sought to bring criminal proceedings against this appellant as a participant in the crime for which her husband was prosecuted, and that the lower court ordered the proceedings against her dismissed forthwith as not being shown in any way to be

a party to the said illicit manufacture of liquor, on the ground that she could not be held criminally liable for actions committed by her husband.

Notwithstanding this action by the lower court the appellee herein assessed both fine and penalty against this appellant and is now attempting to collect it through the medium of a warrant of distraint and sale of her separate individual property.

ASSIGNMENT OF ERROR.

I.

The Honorable United States District Court for the District of Montana erred in dismissing complainant's suit.

II.

The Honorable United States District Court for the District of Montana erred in holding and deciding that Section 3224, Revised Statutes of the United States, precludes complainant and appellant from relief by injunction.

III.

The Honorable United States District Court for the District of Montana erred in holding and deciding that the charges and assessments described and set forth in the warrant for distraint annexed to the bill of complaint, are taxes and assessable as taxes, and collectible by warrant for distraint, and in dismissing plaintiff's bill of complaint on that ground.

IV.

The Honorable United States District Court for the District of Montana erred in holding and deciding that the charges and impositions mentioned and set forth in Title II, Section 25, of the National Prohibition Act are taxes and may be enforced by sale of complainant's property by warrant for distraint and in dismissing complainant's bill of complaint on that ground.

V.

The Honorable United States District Court for the District of Montana erred in holding and deciding that a sale of plaintiff's property under the levy of a warrant for distraint by the Collector of Internal Revenue for the District of Montana, without any action in court, and without giving the plaintiff a day in court, or opportunity to be heard is not illegal and without authority of law, and is not violative of the Constitution of the United States, particularly the Fifth, Sixth, Eighth and Eighteenth Amendments, and in dismissing plaintiff's bill of complaint on that ground.

VI.

The Honorable United States District Court for the District of Montana erred in holding and deciding that plaintiff's only remedy is that of payment of the tax, and penalty, and suing for a refund of such payment and in dismissing plaintiff's suit on that ground.

VII.

The Honorable United States District Court for the District of Montana erred in holding and deciding that complainant's bill in equity did not state a cause of action entitling plaintiff to the relief sought.

VIII.

The Honorable United States District Court for the District of Montana erred in dismissing complainant's suit on the ground and for the reasons that in law and equity plaintiff is entitled to the relief sought.

ARGUMENT.

I.

SECTION 3224 REVISED STATUTES (COMP. STAT. 5947) ASSUMES THAT A LIABILITY FOR A TAX EXISTS AND ITS OBJECT IS TO PREVENT DELAY OR INTERFERENCE WITH THE COLLECTION OF THE FEDERAL REVENUES. IT WAS NOT ENACTED TO ENFORCE THE PROVISIONS OF A PENAL STATUTE TO ASSIST IN THE ENFORCEMENT OF PENALTIES IMPOSED AS A PUNISHMENT FOR CRIME.

Section 3224 reads as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The fundamental rule underlying the section is that the government must not be delayed or interfered with in the collection of its revenues. The section in ques-

tion clearly is revenue act; a statute passed to prevent delay in collecting the revenues of the United States. This is clear from the cases wherein the statute has been applied; they relate to such exactions as clearly fall within the definition for taxes, that is, exactions for revenue for the use of the government. Barnes vs. Railroad, 17 Wallace 307-310, 21 L. Ed. 544 (tax on dividends); Snyder vs. Marks, 109 U. S. 189, 27 L. Ed. 901 (tax on tobacco); High vs. Coyne, 178 U. S. 111, 44 L. Ed. 997 (tax on legatees); Dodge vs. Osborn, 240 U. S. 118, 60 L. Ed. 557 (tax on incomes).

A tax, properly speaking, is a burden imposed upon the individual for the support of the government. New Jersey vs. Anderson, 203 U. S. 483-492, 51 L. Ed. 284. It has been defined also as an "enforced contribution for the payment of public expense." Houck vs. Little River Drainage District, 239 U. S. 254, 60 L. Ed. 266.

A penalty, on the contrary, is a punishment for a crime which has been committed. Its essential idea is that of punishment. U. S. vs. Reisinger, 128 U. S. 398, 32 L. Ed. 480; Huntington vs Ttrill, 146 U. S. 657, 36 L. Ed. 1123.

If the fundamental characteristics of a penalty exists, namely, punishment for crime, its character is not changed by the mode in which it is inflicted, whether by suit or criminal prosecution. U. S. v. Choteau, 102 U. S. 603-611. 26 L. Ed. 246.

An examination of Section 35 of the National Prohibition Act, under which the assessment and collection by distraint in this case is laid, will, it is submitted,

clearly show that it provides for a penalty and not a tax. As said in Thome v. Lynch, 269 Fed. 995, 1001:

> "They are for the purpose of punishment and not for the purpose of revenue; * * * they are imbodied in a statute which in its most important features is highly penal in its nature."

In Accordo vs. Fontenot, 269 Fed. 447, at page 450, the court says:

> "Taking up the first question, it is well settled that Congress may impose taxes for the purpose of regulating any business or occupation, if there is the slightest color of raising revenue, and these taxes may be so excessive as to actually prohibit. An example of this is found in the Act of January 17, 1914, (Comp. St., par. 6287a-6287f), imposing a tax of $300 per pound on the manufacture in the United States of smoking opium. Nevertheless, if any one chose to pay the tax, he could indulge in the business. So with the internal revenue taxes, although one might be guilty of a criminal offense by not paying his taxes promptly, still the tax is primarily intended to raise revenue.
>
> On the other hand, the taxes and penalties provided for by section 35, tit. 2, of the National Prohibition Act, lack every fundamental element of a tax. The manufacture and sale of intoxicating liquor for beverage purposes are absolutely prohibited by the Eighteenth Amendment to the Constitution and the National Prohibition Act. Payment of the so-called taxes could not legalize either

transaction, and the section so states. There is not the slightest pretense of raising revenue, and it should not be presumed that Congress intended to levy a tax for the purpose of prohibition on something already prohibited. It is also exceedingly doubtful that it could do so. Cooley on Taxation 3rd. Ed.) p. 12 et seq., verbo "Maxims of Policy."

It is evident the so-called taxes and penalties provided by section 35, tit. 2, of the National Prohibition Act, are simply additional penalties imposed for the violation of a criminal statute, and section 3224, R. S., is no bar to relief in equity in a proper case. See Dodge vs. Brady, 240 U. S. 122, 36 Sup. Ct. 277, 60 L. Ed. 560."

The assessments provided by Section 35 of Title II of the National Prohibition Act, have been held to be penalties and not taxes in the following cases:

Thome vs. Lynch, 269 Fed. 995, 1001;
Accordo vs. Fontenot, 269 Fed. 447;
Ledbetter vs. Bailey, 274 Fed. 375;
Connelley vs. Gardner, 272 Fed. 911;
Ravitz vs. Hamilton, 272 Fed 721.

The only decisions found to the contrary, aside from the Regal Drug Company case, 273 Fed. 182, are Pummeli vs Riordan, 275 Fed. 846, and Kelly vs. Lewellyn, 274 Fed. 108, and the effect of the former decision is greatly impaired by the statement of the court at the end of the decision that the question was not in his opinion free from difficulty and doubt.

The language used by Congress in Section 35 is, in

itself, strongly indicative of its intent to impose a penalty for the commission of a crime, where it provides for the assessment "from the person responsible for such illicit manufacture of sale" a tax "in double the amount now provided by law, with an *additional* penalty of $500.00 on retail dealers and $1,000.00 on manufacturers." Had Congress intended that this assessment was the assessment of a tax, and not a penalty for the commission of a crime, it could readily have used language clearly and conclusively indicative of such an intention. Its failure to do so is in itself strongly indicitive of the nature of the assessment authorized therein, and when considered in the light of the fundalemtal principals above stated it is conclusive.

II.

A PENALTY IS NOT SUBJECT TO COLLECTION BY DISTRAINT.

The remedy for enforcement of a penalty is either by criminal prosecution or by civil suit. 12 R. C. L. 220, 221, U. S. vs. Stevenson 215 U. S. 190, 54 L. Ed. 453.

As was said in Thome vs. Lynch, 268 Fed. 995, 1004.

> "The second question, whether distraint is the proper method of collecting the exactions demanded, has in effect been answered in the foregoing discussion. As shown above, before the Eighteenth Amendment went into effect, the power of the collector of internal revenue to proceed by distraint

was a limited power, limited to taxes proper and certain specified penalties annexed to taxes proper. This limited power in the collector under the internal revenue laws to collect certain penalties by distraint is not enlarged by any provision of title 2 of the National Prohibition Act, but is, on the contrary, curtailed."

"It may be further observed that the preliminary steps provided in section 3172, R. S. (Comp St. par. 5895), and leading up to the notice and demand in section 3184, R. S. all relating to assessment and collection of internal revenue taxes proper, to-wit: The convassing by the collector; the returns by parties liable to the taxes; the call for such returns; the summons by the collector for examination; and, upon refusal, the making of a return by the collector, were never intended and are not suitable as procedure for collection of penalties such as those prescribed in section 35 of the National Prohibition Act. Nor, indeed was the procedure under the sections above mentioned followed in the instant case. Further, that a civil suit is a proper remedy for the collection of these exactions provided for in section 35 of the National Prohibition Act is recognized by the Internal Revenue Department, but the attitude of the department is shown by the following extracts from regulation No. 12, revised October 1, 1920, issued by the department. On page 42 is the following:

"In making reports in prohibition cases, a tax

and assessment penalty imposed by section 35 of title 2 of the National Prohibition Act should not be overlooked. It will often prove more effective to suppress violations of the law than the actual criminal liabilities imposed."

And again, on page 19, is the following:

"Legal preceedings will not generally be commenced until after the remedy by distraint is exhausted."

Title 2, paragraph 28 of the National Prohibition Act confers on the Internal Revenue Commissioner and subordinate officers for the enforcement of the National Prohibition Act the powers which are conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors. Section 28 therefor simply give to the commissioner and subordinate officers the same powers in enforcing the National Prohibition Act as they had under existing laws relating to the subject. These powers include the enforcement by distraint in case of special taxes and also of certain enumerated penalties under certain of the revenue statutes, but as we have seen the exactions under section 35 of the National Prohibition Act are none of then taxes but all penalties so far as they relate to the manufacture or sale of intoxicating liquor for beverage purposes, then it follows that section 28 gives no powers to collect these penalties by distraint. A consideration of the recent cases sustains the above view. Thus in Kausch vs. Moore 268 Fed. 668, the court holds clearly

rant to collect penalties provided by Section 55, and in that no authority exists for the use of a distraint war-Kelly vs. Lewellen 274 Fed. 112,114, the court says:

> "It is hard to conceive of anything more prominently fixed by law as within the jurisdiction of the District Court than the recovery of penalties. The first Judicial Act, passed by Congress on September 24, 1789, gave the District Courts of the United States jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States. That provision has remained the same, and is not found in the ninth paragraph of section 24, Chapter 2, of the Judicial Code, which went into force January 1, 1912, in the following language:
>
> "Sec. 24. The District Court shall have original jurisdiction as follows:
>
> "Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States." Comp. St. par. 991.
>
> "I am satisfied that Congress has not placed in the hands of the collector of revenue the power to collect, by distress and sale, the penalties provided for in the said section of the National Prohibition Act. This same question has been before courts in other jurisdictions, and decided in favor of the plaintiff where similar bills have been filed. See Accardo vs. Fontenot, Collector of Internal Revenue, 269 Fed. 447, in the District Court for the

Eastern District of Louisiana, where Judge Foster has given the subject grave consideration."

See also the other cases heretofore cited.

III.

THERE IS NO EVIDENCE SUFFICIENT TO AUTHORIZE THE COMMISSIONER OF INTERNAL REVENUE OR THE COLLECTOR OF INTERNAL REVENUE TO MAKE THE ASSESSMENT SOUGHT TO BE COLLECTED HEREIN.

The statute provides that:

"Upon *evidence* of such *illegal* manufacture or sale a tax sholl be assessed against," etc.

It is therefore necessary that evidence of illegal manufacture of sale must be furnished to the commissioner before he has any authority to make the assessment. The term "evidence" in the act must be given its legal meaning. Ledbetter vs. Bailey, 274 Fed. 375, 383.

As said in this case it is elementary that:

"Evidence is intended to describe conditions from which inferences may be logically drawn as to the existence of facts under investigation."

"Evidence is intended to furnish a lead to induce persuasion of the existence or none-existence of facts in issue. It is the physical means by which the belief of the existence of a given fact is created."

"The unsupported reports of officers, such as are described before, indefinite and uncertain as

they may be, and as the notices and liens hereinbefore set out indicate, cannot be evidence such as is contemplated by law, sufficient to establish facts to be used as abasis for a proceeding against either the person or the property of a citizen."

In the present case there was absolutely no evidence in the possession, either of the commissioner of Internal Revenue or the local Collector of Internal Revenue, in any way proving or tending to prove either the manufacture or sale by this appellant of illicit spirits. On the contrary the trial court brushed aside an attempted prosecution of appellant as being entirely unfounded and unwarranted, saying that the mere fact that her husband was engaged in the illicit manufacture of intoxicants could not be held to render her guilty of the offense.

The attempt of the revenue officers to proceed in this case in the arbitrary and unwarranted manner that they have is absolutely without any legal authority under the National Prohibition Act and is a taking of property without due process. The tax was assessed, not upon any hearing, at which, the appellant had opportunity to be heard, but as a result of a secret investigation and report. She was not advised in any way of the matter until the issuance of the notice. Proceedings of this character are well characterized by the United States District Court for the Western District of North Carolina, in Ledbetter vs. Bailey, 274 Fed. 375, 379. In this case the court said:

"Referring again to the reports upon which

these assessments are based, it is an irresistable conclusion, from the character of the notices, the contents of the liens filed, and the manner of assessment, that the information furnished to the taxing authorities in Washington is largely the result of unfounded opinion and alleged facts, exxisting only in the minds of those who have sent in the statements. It is evident that the imaginations of these reporters in many instances have been allowed to take unrestrained flight, and have thereby reached heights inconceivable to the normal mind, and, further, the manner of the execution of the act which we are now considering, by the agencies appointed for its enforcement, has been in many instances such as to trangress the sacred barriers provided by the Constitution for the protection of person and property in this country. The conduct of some of these subordinates has been both arrogant and ruthless, and has reached a degree which has aroused the indignation of many of the best citizens in the land."

"The framers of our organic law undertook to guard against the invasion of the rights of the citizen with respect to the liberty of his person and the sacredness of his home and property and with this end in view provided for trial by jury, for the security of persons, houses, papers and effects against unreasonable searches and seizures, and that the property of a citizen should not be taken without due process of law. Can the proceedings

which have been inaugurated and are being fostered by the federal authorities for the enforcement of the Volstead Act be upheld as due process of law, or in other words can the provisions of the Constitution which undertake to protect property from wrongful seizure, forfeiture, or confiscation be so construed as to permit citizens to be subject to penalties decreed in secret, without notice and without the benefit of a hearing. If so, in my opinion the meaning of the provisions of the Constitution above referred to have been misunderstood by the people.

It is submitted that on account of the lack of evidence to sustain the assessment the attempted assessment upon which all of the proceedings herein sought to be enjoined were based was unauthorized by law and was arbitrary, capricious and without legal justification. In view of the above it is submitted that the decision of the lower court dismissing the bill should be reversed and the case remanded.

Respectfully submitted.

Chas. A. Russell.
Chas. N. Madeen.
H. H. Clarke.
John E. Patterson.
Dan J. Heyfron.
Attorneys for Appellant.